84-1227

No. _____

FILED
JAN 30 1985
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MARCELINO RAMOS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the federal Constitution will permit the California Supreme Court to penalize the State of California for seeking review of a decision of that court before this Court by invalidating a death penalty special circumstance which the California Supreme Court initially had upheld?

2. Whether it may be deemed federal constitutional error to not instruct the trier of fact regarding intent to kill as part of a felony-murder special circumstance when the California Supreme Court made intent an element of the special circumstance based upon legislative interpretation and social policy and not any federal constitutional precepts?

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3. Whether the California Supreme Court may, in essence, overrule the decision of this Court concerning the validity of the Briggs Instruction under the guise of independent state grounds?

TOPICAL INDEX

	Pages
PETITION FOR WRIT OF CERTIORARI	1 - 2
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3 - 6
STATEMENT OF FACTS	6 - 15
HOW THE FEDERAL QUESTIONS ARE PRESENTED	15 - 23
REASON FOR GRANTING THE WRIT	23 - 25
ARGUMENT	25 - 55
I CERTIORARI SHOULD BE GRANTED AS THE CALIFORNIA SUPREME COURT'S REVERSAL OF THE FELONY-MURDER SPECIAL CIRCUMSTANCE BASED ON CARLOS V. SUPERIOR COURT VIOLATES THE PEOPLE'S RIGHT TO DUE PROCESS	25 - 33
II THE HARMLESS ERROR TEST ESPOUSED IN PEOPLE v. GARCIA IS INCORRECT	33 - 42

TOPICAL INDEX

		Pages
III	CERTIORARI SHOULD BE GRANTED AS THE DOCTRINE OF INDEPENDENT STATE GROUNDS WAS INAPPROPRIATELY USED IN THIS CASE	43 - 55
CONCLUSION		56

TABLE OF AUTHORITIES

CASES	Pages
Bullington v. Missouri (1981) 451 U.S. 430	26
California v. Ramos (July 6, 1983) ___ U.S. ___, 77 L.Ed.2d 1171	44, 47, 49, 50
Carlos v. Superior Court (1984) 35 Cal.3d 131	26, 30, 33
Connecticut v. Johnson (1983) 460 U.S. 73	37
Hopper v. Evans (1982) 456 U.S. 605	41
Mullaney v. Wilbur (1975) 421 U.S. 684	37
People v. Anderson (1972) 6 Cal.3d 628	52
People v. Daan (1984) 161 Cal.App.3d 22	54
People v. Garcia (1984) 36 Cal.3d 539	30, 33, 35, 37
People v. Hood (1969) 1 Cal.3d 444	26
People v. Ramos (Ramos I) (1982) 30 Cal.3d 553	27, et passim
People v. Ramos (Ramos II) (1984) 37 Cal.3d 136	30, et passim

TABLE OF AUTHORITIES
(cont.)

CASES	Pages
People v. Superior Court (Engert) (1982) 31 Cal.3d 797	54
People v. Velazquez (1980) 26 Cal.3d 425	42
People v. Watson (1956) 46 Cal.2d 818	35, 36
Sandstrom v. Montana (1979) 442 U.S. 510	37
Sims v. Georgia (1967) 385 U.S. 538	45
Snyder v. Massachusetts (1934) 291 U.S. 97	27
Stein v. New York (1952) 346 U.S. 156	26
CONSTITUTIONS	
United States Constitution,	
art. 6, § 2	45
California Constitution,	
art. I, § 27	52, 53, 54
art. I, § 28, subd. (d)	54
art. 6, § 13	36

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Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of California issued on November 1, 1984, reversing the judgment insofar as it relates to the special circumstance and penalty of death.

A petition for rehearing was denied December 13, 1984. The remittitur was issued on December 14, 1984.

OPINIONS BELOW

The opinion of the California Supreme Court (People v. Ramos (1984) 37 Cal.3d 136) appears as Appendix A of this petition. A copy of the California Supreme Court's order denying the petition for rehearing without opinion appears as Appendix B.

JURISDICTION

The judgment of the California Supreme Court was filed on November 1, 1984. A timely petition for rehearing was denied on December 13, 1984. This petition is filed within 60 days of that date and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, article 6, section 2, Amendments Five and Fourteen. California Constitution, article 6, section 13; article 1, section 27; article 1, section 28, subdivision (d). California Penal Code section 190.2, subdivision (a)(17)(i).

STATEMENT OF THE CASE

Respondent Marcelino Ramos was charged with two counts of robbery, one count of murder and one count of attempted murder in connection with a robbery and shooting incident at an Orange County fast food establishment in June of 1979. Ramos was convicted on all counts and the jury found the murder and attempted murder to be of the first degree. The jury also found that the special circumstance that the murder was

committed while appellant was engaged in a robbery was true. (Pen. Code, § 190.2, subd. (a)(17)(i).) The jury returned the death penalty. (People v. Ramos (1982) 30 Cal.3d 553, 562.)

The California Supreme Court affirmed respondent's convictions as well as the special circumstance. However, the court reversed the death penalty. The court did so because the trial judge had instructed the jury that the sentence of life imprisonment without possibility of parole may be commuted by the Governor to a sentence that includes the possibility of parole. This instruction, known as the Briggs Instruction, was mandated by California law. The California Supreme Court concluded this instruction violated the federal Constitution. (People v. Ramos, supra, at pp. 562-563.)

The State of California thereafter sought review by this Court. On July 6, 1983, this Court reversed the holding of the California Supreme Court. This Court concluded the Briggs Instruction did not violate the federal Constitution. (California v. Ramos (July 6, 1983) ____ U.S. ____, 77 L.Ed.2d 1171.)

On November 1, 1984, the California Supreme Court issued its second opinion in the Ramos case. (People v. Ramos (1984) 37 Cal.3d 136.) (Appen. A.)

In this opinion the court reversed the felony-murder special circumstance which it had upheld in the first Ramos opinion. The court

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also concluded the Briggs Instruction violated the California Constitution.[1/]

STATEMENT OF FACTS

On the evening of June 2 and early morning of June 3, 1979, Kevin Pickrell and Kathryn Parrott were working at a Taco Bell restaurant at 2820 South Bristol in Santa Ana. They were expecting to close at 1:00 a.m. Shortly before that time a "customer," later identified as respondent's co-defendant Ruben Gaitan, came in and presented a piece of paper with a food order on it to Kathryn Parrott. (RT 97, 317-320, 330-331.)

As Pickrell was preparing the food order presented by Gaitan,

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1. The first Ramos opinion of the California Supreme Court will be referred to as Ramos I while the second opinion will be referred to as Ramos II for convenience.

respondent, who was employed at the Taco Bell, entered and asked to check his work schedule. Pickrell indicated that respondent could go into the back to check his schedule. Respondent went to the back, then returned shortly and displayed a gun. Respondent ordered Ms. Parrott and Pickrell into a walk-in refrigerator. Gaitan went into the refrigerator first and removed a fire axe from the wall. That was the last Pickrell saw of Gaitan. (RT 324-335, 373, 376-379, 383-384.)

Respondent ordered Pickrell and Ms. Parrott to sit down in the refrigerator and asked them both for the location of the keys to the safe. They told him the keys were in the safe, and he went out. Pickrell and Ms. Parrott began talking, with Pickrell expressing the fear that respondent would kill them

because he knew them. Respondent returned, told them to be quiet and left again. (RT 336-337, 341-342, 352-353.)

Respondent was gone for about five minutes, then returned and told Ms. Parrott and Pickrell to go to the back of the walk-in. When they got to the back wall, respondent told them to kneel and they did so. He told them to take their hats off and bend their heads down. Respondent told them to say their prayers. Pickrell asked him not to hurt them and respondent just sort of laughed. He told Ms. Parrott to put a rag in her mouth. After that, Pickrell heard her moan and felt her come toward him. He then felt a sharp blow to the back of his head and fell over. He felt another blow to his head and heard ringing in his ears. (RT 355-362.)

Pickrell lay with his eyes closed, thinking he might be dead, but opened his eyes. He lay there for awhile, then got up, got some change and called the police. When the police arrived, he told them it was respondent who had been in the walk-in at the time he was injured. (RT 362-367.)

A police officer who arrived about 1:20 a.m. found Kathryn Parrott lying motionless in the refrigerator with a terrycloth towel stuffed in her mouth, and with no pulse. (RT 2-10, 3-4, 13-17.) The autopsy surgeon concluded Ms. Parrott died from cerebral destruction due to a gunshot wound to the head. There was a single gunshot wound which appeared to be a contact wound. Additionally, she had suffered two deep lacerations in the back of the head which appeared to have been

inflicted at or about the time of death, and had been inflicted by a blunt, heavy object. (RT 69-77.) Kevin Pickrell had suffered lacerations to the back of the head, including one with an area around it which appeared to be a burn or abrasion. It appeared he had been struck in the back of the head with a metallic object that then moved around to the side of the head, hit a bony prominence and shattered, with some fragments continuing on and exiting the head, taking some tissues from the ear as they left. (RT 305-310, 314.)

The manager of the Taco Bell calculated a loss of approximately $1,200.00 from the robbery. (RT 37-41.) Respondent and Gaitan were taken into custody on June 3, and the same day an apartment at 3101 South Bristol was searched pursuant to a warrant. Money

in the amount of approximately $1,000.00 was recovered. (RT 101, 103-105, 117.)

Respondent did not present a defense at the guilt phase. Ruben Gaitan testified on his own behalf and admitted copying a food order which respondent had prepared while they were in the apartment, but denied any connection with the robbery and killing. (RT 452, 455, 457-460, 467-469.)

At the penalty phase the prosecution presented the testimony of one David Lam, who had been in custody for felony non-support in June of 1979. One morning while awaiting to go to court he saw respondent standing in front of him, chained with two other people. He overheard bits and pieces of a conversation to the effect that they were not going to be found guilty of the charge because they were sure the people were no longer

alive. Respondent was saying to the other person how much of a "trip" it was; how the people were on their hands and knees begging for their lives before he shot them. (RT 729-732.) The People also introduced evidence of portions of guns, a notebook, letter and will which were found in the apartment. (RT 754-760, 762-764.)

The presentation of defense evidence concerned the largest portion of the penalty phase.[2/] Respondent testified on his own behalf and admitted robbing and shooting both the victims, but denied that he intended to kill them. He testified that when he first went back into the cooler he had merely

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2. Defense evidence presented at the penalty phase is set forth at some length in the opinion of the California Supreme Court. (Ramos I, supra, 30 Cal.3d at pp. 564-567.)

knocked out the victims with a piece of iron pipe. Ruben Gaitan had told him it was necessary to kill them, so he had gone back in and pointed the gun at each one of the victims with the intent just to graze them and knock them out. (RT 834-854, 877, 900.) He testified that the only reason he told the victims to say their prayers before he pulled the trigger was just to scare them, and he did not laugh but just smiled. (RT 913, 930.) Respondent also testified to the effect that Kevin Pickrell had laughed at him when he first displayed the gun, and that made him mad. He further testified that he had had one or two drinks and had taken some "speed." (RT 844-846.)

Friends and relatives testified as to respondent's childhood and early youth in San Antonio, Texas.

Respondent and his brother had been adopted when they were infants, and both adoptive parents had died by the time he turned fourteen. After that he stopped going to school regularly and began hanging around with bad company, including Ruben Gaitan. Although respondent had gone into the Texas National Guard at one time, otherwise he had worked only at menial jobs. (RT 774-779, 792-800.) A defense psychiatrist expressed the opinion that respondent was an inadequate personality, with a diffused, generalized type of brain damage and elements of a borderline schizophrenic personality. He opined that some of the dynamics of the shooting included respondent's preexisting personality factors, the taking of amphetamines with alcohol a few hours before, preexisting brain

damage, disordered reality testing, anger at Ruben Gaitan and anger because Kevin Pickrell did not at first take him seriously. The doctor also believed that respondent may have intended only to graze the victims. (RT 959-960, 970-971, 992-1001.)

A defense psychologist testified respondent had a full scale I.Q. of 75, and that the result of a test of neurological impairment indicated mild congenital brain damage. (RT 1069, 1076-1078.)

HOW THE FEDERAL QUESTIONS ARE PRESENTED

This case presents three federal questions of substantial importance.

The first federal question relates to the right of the state to fundamental fairness and due process.

In Ramos I (30 Cal.3d 553), the California Supreme Court upheld the felony-murder special circumstance. Nevertheless, it reversed the death penalty because the trial court instructed the jury on the Governor's commutation power. The court concluded this instruction, known as the Briggs Instruction, violated the federal Constitution. The State of California sought review of this issue by this Court and this Court concluded the instruction did not violate the federal Constitution. The case was remanded.

In the interim the California Supreme Court had concluded a felony-murder special circumstance could not stand unless it had been established the killing also had been intentional. (Carlos v. Superior Court (1983) 35 Cal.3d 131.) Respondent argued in

supplemental briefing that Carlos compelled invalidation of the felony-murder special circumstance in this case. Petitioner pointed out in a response that Carlos should not be applied retroactively to this case and also argued that the California Supreme Court had upheld the felony-murder special circumstance in Ramos I and should not modify that holding following remand by this Court.

Nevertheless, the California Supreme Court applied the Carlos decision to this case and invalidated the felony-murder special circumstance it had upheld in Ramos I. (See People v. Ramos (Ramos II) (1984) 37 Cal.3d 136 (Appen. A.) Petitioner objected to this result in a rehearing petition.

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The petition argued the invalidation of a special circumstance the court had already upheld penalized the State of California for seeking review from this Court after Ramos I. It is well settled that a defendant cannot be penalized for exercising his right to appeal. (Bullington v. Missouri (1981) 451 U.S. 430.) The People of the State of California just like a defendant are entitled to due process and fundamental fairness. Consequently, the State of California should not have been penalized for exercising its right to appeal the decision of the California Supreme Court in Ramos I to this Court. However, the rehearing petition was denied. Accordingly, this case presents a fundamental question regarding the scope of the right of the state as well as the defendant to due process and fairness.

(Stein v. New York (1952) 346 U.S. 156, 197; Snyder v. Massachusetts (1934) 291 U.S. 97, 123.)

This case presents a second fundamental issue as well. In Carlos v. Superior Court, supra, 35 Cal.3d 131, the California Supreme Court concluded that a felony-murder special circumstance could not stand unless the trier of fact was instructed and found intent to kill. This decision was reached as a matter of statutory interpretation and social policy. However, in People v. Garcia (1984) 36 Cal.3d 539, the court elevated what appeared to be state procedural error into federal constitutional error. The court also concluded that absent certain narrow circumstances the error was prejudicial.

Petitioner had pointed out in supplemental briefing and oral argument

that any conceivable error was harmless as intent to kill had been established as a matter of law anyway. However, in Ramos II (appen. A) the court concluded intent to kill had not been established as a matter of law and the case had to be reversed in light of Carlos and the prejudice test set forth in Garcia.

Petitioner's rehearing petition pointed out that Ramos II and Garcia were incorrectly decided as Carlos error could not be elevated into federal constitutional error as Carlos was not based on federal grounds. The Supreme Court of California, however, denied the petition for rehearing. The issue of whether failure to instruct on an element of a special circumstance mandated by a state court can amount to federal constitutional error is presented to this Court in this petition.

(Cf. Connecticut v. Johnson (1983) 460 U.S. 73.) This issue is already before this Court in California v. Garcia (Petn. for Certiorari pending).

This case also presents a third fundamental question as to the authority of the state court to use the doctrine of independent state grounds as a means of overruling decisions of this Court.

This Court concluded in California v. Ramos, supra, 77 L.Ed.2d 1171, that the Briggs Instruction did not violate the federal Constitution and remanded the case to the California Supreme Court for further consideration. Respondent asked that Court to invalidate the instruction under the California Constitution while petitioner pointed out the court could not do so without, in essence, overruling

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this Court since the bases for upholding the instruction applied with equal force under either Constitution.

Nevertheless, the California Supreme Court purported to rely on the California Constitution to invalidate the Briggs Instruction. A petition for rehearing was filed by petitioner pointing out the court did nothing more than exercise its own judgment as to the invalidity of the instruction, overruled this Court's evaluation of the validity of the instruction, and, in essence, sat as a reviewing court of this Court in violation of the Supremacy Clause of the United States Constitution. (U.S. Const., art. 6, cl. 2.)

However, the petition for rehearing was denied. Thus, this case also presents a fundamental federal question with regard to the power of

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state courts under the Supremacy Clause to sit as a reviewing court of this Court under the guise of using independent state grounds.

REASON FOR GRANTING THE WRIT

The writ should be granted in this case as three questions of fundamental national import are presented.

First, whether the due process clause of the federal Constitution protects the right of the state to due process and fundamental fairness in the same way that it protects a defendant's right to due process and fairness so that the state, like a defendant, may not be penalized for exercising its right to seek review from this Court of a decision by a state court. If the decision of the California Supreme Court in Ramos II, invalidating the special circumstance it had upheld in Ramos I,

is allowed to stand here, the rights of the State of California and other states in similar circumstances to seek review from this Court could be chilled.

Second, this case presents an even more monumental issue as to whether a state court may sit as a reviewing court of this Court under the guise of using independent state grounds. If this is permitted, the fundamental notion that decisions of this Court are binding on lower courts could be seriously undermined. (U.S. Const., art. 6, cl. 2.) In this case the California Supreme Court, in essence, overruled this Court when it invalidated the Briggs Instruction under the California Constitution after this Court had upheld the instruction under the United States Constitution.

Review is also desired to determine whether the California Supreme Court may require intent to kill for the felony-murder special circumstance as in Carlos v. Superior Court, supra, 35 Cal.3d 131, and then hold the failure of the jury to be instructed on this requirement somehow amounts to federal constitutional error as suggested in People v. Garcia, supra, 36 Cal.3d 539.

Thus, review of the decision of the California Supreme Court is of the utmost necessity here.

ARGUMENT

I

CERTIORARI SHOULD BE GRANTED AS THE CALIFORNIA SUPREME COURT'S REVERSAL OF THE FELONY-MURDER SPECIAL CIRCUMSTANCE BASED ON CARLOS V. SUPERIOR COURT VIOLATES THE PEOPLE'S RIGHT TO DUE PROCESS

Initially, it is respectfully requested certiorari be granted as the

decision of the California Supreme Court in Ramos II reversing the felony-murder special circumstance in light of Carlos v. Superior Court (1984) 35 Cal.3d 131 violates the right of the People to due process.

It is well settled that a defendant cannot be penalized for exercising his right to appeal. (People v. Hood (1969) 1 Cal.3d 444, 459; Bullington v. Missouri (1981) 451 U.S. 430.) The State, just like a defendant, is entitled due process and fundamental fairness. Consequently, the State as well as the defendant, cannot be penalized for exercising its right to appeal the California Supreme Court's decision in Ramos I to this Court. "The People of the State are also entitled to due process of law." (Stein v. New York (1952) 346 U.S. 156, 197.) Justice,

though due to the accused, is due to the accuser too. (Snyder v. Massachusetts (1934) 291 U.S. 97, 123.)

The decision of the California Supreme Court in Ramos II (appen. A) resulting in a reversal of the felony-murder special circumstance has, in essence, penalized the right of the People to appeal decisions of that court to the United States Supreme Court and has deprived the People of their right to due process. Thus, certiorari is required here.

In the first Ramos decision, People v. Ramos (1982) 30 Cal.3d 553, (Ramos I) respondent raised the issue of the validity of the felony-murder rule and argued the felony-murder special circumstance should require an intent to kill. (Id. at pp. 589-590 and fn. 17.) The California Supreme Court

expressly upheld the felony-murder special circumstance relying on well-settled law, but suggested a reexamination of the rule might be appropriate in a case other than this one. That court also expressly declined to consider whether the felony-murder special circumstance should require an intent to kill before the death penalty may be imposed. (Ramos I, supra, 30 Cal.3d at p. 590, fn. 17.)

Moreover, that court expressly observed that "The record in the guilt and penalty phases strongly suggests that the jury viewed the killing in this case as intentional and malicious. It is thus unlikely that the giving of the felony-murder instruction worked to appellant's detriment." (Ramos I, supra, at p. 590.) Thus, the court basically concluded the killing in this case was intentional.

The only part of the proceeding that was reversed was the penalty phase of the trial. This was caused by the fact that court concluded the Briggs Instruction violated the California Constitution. (Ramos I, supra, 30 Cal.3d at p. 602.)

Thereafter, petitioner petitioned this Court for review of the California Supreme Court's ruling on the Briggs Instruction. This Court ultimately reversed the judgment of that court on July 6, 1983, after finding the Briggs Instruction did not violate the United States Constitution. The case was then remanded to the California Supreme Court for further proceedings.

That court did not recalendar this case until late August of 1984. Meanwhile, on December 12, 1983, that

court decided Carlos v. Superior Court, supra, 35 Cal.3d 131. This case held the prosecution had to prove the defendant had the intent to kill in order for the prosecution to seek to have the trier of fact sustain a felony-murder special circumstance.

Thereafter, in People v. Garcia (1984) 36 Cal.3d 539, that court concluded absent certain narrow circumstances it was reversible error for a trier of fact to sustain a felony-murder special circumstance where the trier of fact had not been instructed it had to find the defendant's killing of the victim was intentional.

That court then applied Carlos and Garcia to this case and reversed the same special circumstance it had already upheld. (People v. Ramos (1984) 37 Cal.3d 136 (Ramos II, appen. A).) To

petitioner it seems manifestly inappropriate for that court to now reverse a special circumstance it had previously upheld. This is particularly true when that court could have considered the issues relating to the felony-murder special circumstance, but expressly declined to do so in Ramos I.

Furthermore, it seems the People are being unfairly treated as that court now concludes the felony-murder special circumstance must be reversed because the jury was not instructed the killing was intentional although that court essentially concluded in Ramos I that the killing was intentional. (Ramos II, supra, 37 Cal.3d at pp. 145-150.) This result has penalized the People for exercising their rights to appeal to the United States Supreme Court.

That court also notes in the opinion that principles of the doctrine of law of the case do not apply where the law has changed between intervening appellate decisions. Thus, the People cannot rely on that court's conclusions in Ramos I. (See Ramos II, supra, 37 Cal.3d at p. 146.) Such a result is unfair for several reasons here. First, the California Supreme Court could have dealt with the issue of the validity of the felony-murder special circumstance in Ramos I, but declined to do so. Second, that court went out of its way in Ramos I to observe the defendant in this case had the intent to kill. Third, that court did not immediately calendar the Ramos case on remand from this Court for about one year. Oral argument was not held until late August of 1984, nearly one year after Ramos I

was reversed by this Court. Because of this delay, Carlos and Garcia were decided in the interim.

Accordingly, petitioner would respectfully submit all these factors coalesce to constitute fundamental unfairness to the State of California in this case, have penalized the State for appealing, and violated the right of the People to due process and fundamental fairness.

II

THE HARMLESS ERROR TEST ESPOUSED IN PEOPLE v. GARCIA IS INCORRECT

Certiorari also should be granted so that People v. Garcia, supra, 36 Cal.3d 539, can be evaluated. This matter is already before this Court in Garcia v. California (cert. pending). In Carlos v. Superior Court, supra, 35 Cal.3d 131, the California Supreme Court

held as a matter of social policy and legislative interpretation that no one could be put to death based upon the felony-murder special circumstance unless the trier of fact was instructed on and concluded the defendant had the intent to kill. Carlos was not based on the United States Constitution, but based upon a social policy decision of that court and corresponding interpretation of the 1978 death penalty initiative. Under these circumstances it seemed that the correct test for prejudice where Carlos error occurred would be the state test of harmless error in

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the California Constitution and People v. Watson (1956) 46 Cal.2d 818, 835-837.)[3/]

However, in People v. Garcia, supra, 36 Cal.3d at page 539, the California Supreme Court converted state procedural error into federal constitutional error.

As interpreted by that court, the decisions of this Court purportedly

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3. The California harmless error test is set forth in the California Constitution. It provides as follows:

> "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of

suggest that where intent is an element of a crime, instructions which do not let the jury resolve the issue of intent violate the federal constitution. In those cases, the lack of instructions on intent is prejudicial error except in

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Footnote 3 continued:

> justice. [New section adopted November 8, 1966.]" (Cal. Const., art. 6, § 13; original emphasis.)

The California Supreme Court has described the test in the following language:

> "That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire case, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (People v. Watson, supra, 46 Cal.2d at pp. 835-837.)

certain very narrow circumstances. (People v. Garcia, supra, 36 Cal.3d at p. 539.)

However, there are several basic flaws in the interpretation of these cases. First, the decisions of this Court in Sandstrom v. Montana (1979) 442 U.S. 510; Connecticut v. Johnson (1983) 460 U.S. 73, and Mullaney v. Wilbur (1975) 421 U.S. 684, dealt with situations where presumptions were involved and the trier of fact was affirmatively required to presume certain elements of a crime had been proved when the prosecution had not necessarily proved these elements.

This is far different from the situation presented here where the jury was not told intent could be presumed, but was simply not instructed on the issue of intent at all. Saying nothing

at all is certainly different and far less prejudicial than affirmatively instructing the jury to presume a matter which had not been proved had to be presumed proved.

Moreover, this Court's cases rest on the fundamental precept that a defendant cannot be convicted of a crime unless the jury is instructed as to all the elements of the crime. To do so would violate the basic tenets of due process since no man should be punished for a crime unless the prosecution has established all the elements of the crime.

Yet, there is no reason to believe such a rule would carry over to special circumstance in a death penalty case. In a situation such as this one the prosecution has met the basic standards of due process by proving every

element of the crime the defendant has been charged with. It also proved the defendant fit within the felony-murder special circumstance. The only error was that the jury was not advised of the fact (based on a decision of the California Supreme Court as a matter of social policy and corresponding legislative interpretation) that a felony-murder special circumstance could not be sustained unless the defendant had the intent to kill.

Yet, this does not necessarily amount to federal constitutional error of the type discussed in the decisions of this Court. Rather, it seems to be more of an issue of California constitutional error. Thus, certiorari should be granted to evaluate the correctness of Garcia.

Even assuming arguendo Garcia espouses the correct test for harmless error, it is clear respondent suffered no prejudice under the federal Constitution as Ramos' intent to kill was established as a matter of law by the evidence.

The evidence shows Ramos fired the gun at the victims from point blank range, killing one of the victims and wounding the other. Such evidence unequivocally establishes respondent had the intent to kill. The opinion of the court, however, points to the fact the bullet only grazed one of the victims. (Ramos II, supra, 37 Cal.3d at p. 148.) However, the fact that Ramos was unsuccessful in killing one of the victims does not mean he did not intend to kill the victim. The fortuity of where the bullet ended up has no bearing on the

fact Ramos intended to kill the victims since he fired his gun at them at close range and killed one of them.

Moreover, the California Supreme Court's conclusion the evidence does not support a finding of intent to kill as a matter of law neglects to consider the setting in which the killing took place. Ramos had the two victims kneel on the floor, remove their hats, and told them to say their prayers. He also forced Parrott to place a rag in her mouth. Given these facts, it is inconceivable Ramos did not have the intent to kill the victims.

In Hopper v. Evans (1982) 456 U.S. 605, 613, the defendant shot the victim in the back and killed him. This Court concluded intent to kill was established as a matter of law. A contrary conclusion could hardly be

reached on the facts presented here. When a defendant fires a loaded gun at someone's head at point blank range it can hardly be said the defendant did not have the intent to kill. (See also People v. Velazquez (1980) 26 Cal.3d 425.)

Finally, while the California Supreme Court has now chosen to limit its language in Ramos I, it is clear beyond any doubt that in Ramos I that court essentially found the killing was intentional and malicious. (Ramos I, supra, 30 Cal.3d at p. 590, fn. 17.) Neither the passage of time nor a change in the law can change this fact.

Accordingly, as Carlos error is not federal constitutional error and the evidence establishes as a matter of law that Ramos had the intent to kill in this case, certiorari should be granted.

III

CERTIORARI SHOULD BE GRANTED AS THE DOCTRINE OF INDEPENDENT STATE GROUNDS WAS INAPPROPRIATELY USED IN THIS CASE

Petitioner next requests certiorari be granted because the California Supreme Court inappropriately used the doctrine of independent state grounds to invalidate the Briggs Instruction. This instruction tells the jury the governor has the power to commute the term of life without parole.

In Ramos I the California Supreme Court concluded the Briggs Instruction violated the federal Constitution and required a reversal of the penalty judgment and a remand for further proceedings. (Ramos I, supra, 30 Cal.3d 553.) The State of California petitioned this Court for a writ of certiorari. This Court granted certiorari

to review the decision and concluded the Briggs Instruction did not violate the federal Constitution. (California v. Ramos (July 6, 1983) ___ U.S. ___, 77 L.Ed.2d 1171.)

In that opinion this Court expressly declined to decide whether the Briggs Instruction violated the California Constitution. However, it noted on remand the California Supreme Court could address this issue. (California v. Ramos, supra, at p. 1178, fn. 4b.)

However, petitioner would respectfully submit that what occurred in this case was not a decision on independent state grounds, but a decision by the California Supreme Court to overrule the judgment of this Court. We believe such a decision is contrary to the fundamental precept that decisions of the

United States Supreme Court interpreting the federal Constitution are the supreme law of the land and are binding on lower courts. (U.S. Const., art. 6, § 2; Sims v. Georgia (1967) 385 U.S. 538, 544.)

Although the California Supreme Court initially had an opportunity to decide the Briggs Instruction issue on independent state grounds in the first Ramos case, it did not do so. Indeed, it expressly declined to do so. (Ramos I, supra, 30 Cal.3d at p. 600, fn. 24.) Given this fact, petitioner finds it difficult to believe there was any essential state policy compelling use of independent state grounds after remand.

Moreover, what that court has done is examine the decision of this Court in California v. Ramos, and then has exercised its own judgment and

judicial views as to whether the Briggs Instruction may properly be used.

For example, that court first observes the Briggs Instruction is misleading as it only tells the jury that the term of life without parole is subject to commutation and does not tell the jury that the punishment of death is subject to commutation. (Ramos II, supra, 37 Cal.3d at pp. 153-156.) In reaching this conclusion the court does not rely on any specific authority to support this conclusion other than its own opinions on the matter.

However, the justices of this eminent Court exercised their own independent judgment on the issue and concluded the instruction did not skew the jury toward death. As this Court noted:

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"Moreover, we are not convinced by respondent's argument that the Briggs Instruction alone impermissibly impels the jury toward voting for the death sentence. Any aggravating factor presented by the prosecution has this impact. As we concluded in Part II, supra, the State is constitutionally entitled to permit juror consideration of the Governor's power to commute a life sentence. This information is relevant and factually accurate and was properly before the jury. Moreover, the trial judge's instructions 'did not place particular emphasis on the role of [this factor] in the jury's ultimate decision.' Zant v. Stephens, ____ U.S. ____, ____, 77 L.Ed.2d 235, 103 S.Ct. ___ (1983); cf. id., at ____ ____, 77 L.Ed.2d 235, 103 S.Ct. ____."
(California v. Ramos, supra, 77 L.Ed.2d 1171, 1188, fns. omitted.)

The California Supreme Court next points out that even if the instruction were modified to explain that the commutation power also applied to the death penalty, the instruction still

would violate the state Constitution as it allows the jury to consider speculative matters which should not influence the jury's determination. This is so we are told because the jury should not consider post-conviction actions by other governmental entities in determining the sentence to be imposed. (Ramos II, supra, 37 Cal.3d at pp. 155-158.)

This conclusion once again does not rest on any specific provision of the California Constitution or any specific point of California policy. Instead, it consists of a value judgment by that court as to what is speculative. However, the eminent justices of this Court have exercised their own judgment on the same instruction and specifically concluded it did not involve speculative matters.

Instead, by bringing to the jury's attention the possibility that the defendant may be returned to society, the instruction invites the jury to assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society. Thus, it focuses the jury on the defendant's probable future dangerousness. (California v. Ramos, supra, 77 L.Ed.2d at p. 1182.)

The Supreme Court of California further concludes, without citation to any specific provision of the California Constitution or any specific policy in the state on this issue, that the instruction deflects the jury from its proper function.

However, the controlling majority of this Court reached a contrary conclusion based upon their

judicial evaluation of the instruction. This Court concluded that the instruction focused attention to the defendant's future dangerousness so the jury's deliberation is individualized. Moreover, the instruction simply places before the jury an element to be considered, along with others, in determining the appropriate sentence.

Finally, and perhaps of most import, the instruction is an accurate statement of a potential sentencing alternative, and corrects the misconception conveyed to the jury by the phrase "life imprisonment without possibility of parole." (California v. Ramos, supra, 77 L.Ed.2d at p. 1186.)

> "The Briggs instruction thus corrects a misconception and supplies the jury with accurate information for its deliberation in selecting the appropriate sentence." (Fn. omitted.)

Thus, certiorari should be granted here the California Supreme Court did not really exercise its right to use independent state grounds to decide the validity of the commutation instruction. Rather, the court, in essence, did nothing more than exercise its decision-making power to overrule the judgment of this Court. Indeed, this conclusion is buttressed by the fact the dissent by Justice Lucas rebuts the points raised in the majority opinion by simply citing to specific portions of the decision of this Court in California v. Ramos. (Ramos II, supra, 37 Cal.3d at pp. 159-162 (Lucas, J., dissenting).)

Furthermore, we would respectfully suggest that it is questionable whether the framers of the California Constitution ever intended to have the

shield of the California Constitution used as a sword for the California Supreme Court to overrule decisions of the United States Supreme Court.

Indeed, in February of 1972, the California Supreme Court held the death penalty law in effect at that time violated the California Constitution. (People v. Anderson (1972) 6 Cal.3d 628.)

However, within nine months, on November 7, 1972, the People of the State of California nullified the Anderson decision through Proposition 17 which expressly provided the death penalty did not constitute cruel or unusual punishment under the California Constitution. The initiative added section 27 to article I of the California Constitution. It provides:

> "All statutes of this state in effect on February

> 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative or referendum.
>
> "The death penalty, provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution."

This certainly suggests the citizens of California did not wish to have the death penalty reevaluated under the California Constitution.

While we recognize the California Supreme Court has held that article I, section 27 of the California Constitution does not automatically validate any death penalty related matter under the state Constitution (see

People v. Superior Court (Engert) (1982) 31 Cal.3d 797, 808), we would respectfully note this provision reflects a strong feeling on the part of the citizens of this state who voted for article I, section 27 that the California Constitution not be used as a means of reversing death penalty judgments. This view is further supported by the recent passage of Proposition 8 by the voters which amended the California Constitution to bring California search and seizure law in line with federal search and seizure law. (Cal. Const., art. I, § 28, subd. (d); People v. Daan (1984) 161 Cal.App.3d 22.)

Furthermore, petitioner would note the timing of the California Supreme Court's ruling -- after a decision by the United States Supreme Court -- also suggests that court did not use

independent state grounds as a basis for invalidating the Briggs Instruction. Rather, the court simply chose to overrule this Court in the guise of using independent state grounds. Thus certiorari should be granted in this case.

* * *

CONCLUSION

Therefore petitioner respectfully requests this Court grant certiorari.

Respectfully submitted,

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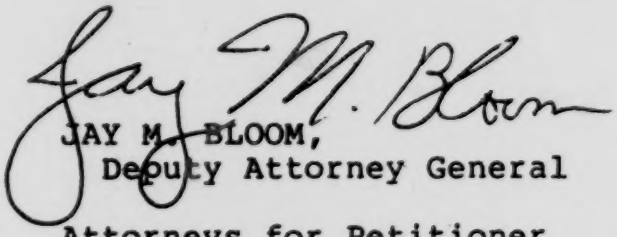

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No: _____
October Term, 1984

PEOPLE OF THE STATE OF
CALIFORNIA

Petitioner,

v.

MARCELINO RAMOS,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within PETITION FOR WRIT OF CERTIORARI & APPENDICES as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing 3 copies in a separate envelope addressed for and to each addressee named as follows:

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FOR DELIVERY TO:
Hon. R. J. Beacom

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 28th day of January, 1985.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, January 28, 1985.

Clifford E. Reed Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 28th day of January, 1985.

Vida M. Allen
Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1986

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